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Supreme Court U.S.
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NO. 88-~~7626~~ 7629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT WAYNE VICKERS,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a defendant who has been examined by ten to twenty doctors over a decade have a constitutional right to be sent out of state for 4-6 weeks testing by doctors of his choice to establish a physical condition which, even if definitively established, would be of minimal assistance to the jurors in evaluating his mental state at the time of the crime?

2. Is a defendant constitutionally entitled to have jurors decide the aggravating circumstances that may qualify him for the death penalty?

3. Does Arizona's death penalty statute violate the Eighth and Fourteenth Amendments by:

a) Requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency; and

b) not requiring the sentencer to consider as potential mitigation anything the defendant has not proven by a preponderance of the evidence?

4. Has Arizona achieved a constitutionally acceptable interpretation of the "especially heinous, cruel, or depraved" circumstance?

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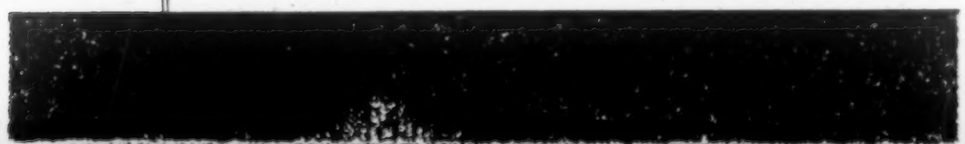
STATEMENT OF THE CASE

Originally, petitioner was indicted in March 1982 for the murder of William (Buster) Holsinger and arson of an occupied structure. He was convicted of those charges and received the death penalty for the murder. The Arizona Supreme Court reversed. State v. Vickers, 138 Ariz. 450, 675 P.2d 710 (1983). In October 1985, the state proceeded to trial upon the first-degree murder charge. The following evidence was adduced at trial.

The evening of March 4, 1982, John Marling was the pod officer in wing 1 of cellblock 6 at the state prison. Holsinger was housed in B-13, Luis Mata in B-14, petitioner in B-15, and Sylvester Smith in B-16. (R.T. of Oct. 17, 1985, at 98-99, 112-13.) Shortly after the evening meal, about 5:00 p.m., Marling let petitioner out of his cell to "porter," sweep and mop the pod and collect the trash. (Id. at 100-01.) When petitioner collected the trash, Marling opened the door to the pod to permit him to set it outside near a stairwell. Having closed that door, Marling picked up the trash and took it to wing 4 at the other end of the building. He was gone for 10 minutes and the door to petitioner's cell was open. (Id. at 95, 102, 108.) Alerted to a fire back in wing 1, Marling returned to discover black smoke filling the pod. Captain Herbert Padilla and Correctional Service Officer (CSO) Mitchell Vancura succeeded in getting petitioner out of the pod. Due to the smoke, they could not reach the three other inmates until the fire department brought airpacks. (Id. at 72-78, 83-84.) When Padilla and Vancura had taken petitioner down the stairs from the pod and into the hallway, Padilla asked what had happened because the officers did not know. Petitioner replied: "I burned Buster." Uncertain what he said, Padilla

asked him to repeat it, and petitioner did. (Id. at 80.) Padilla then asked, "Is he dead?" Petitioner said, "He should be, he's on fire." (Id. at 81.) Officer Vancura overheard these statements. Vancura also heard petitioner say that he "got the old man back" and "burnt him out." (Id. at 121.) With airpacks, Vancura and Padilla managed to drag out Sylvester Smith, who was convulsing in a state of semi-consciousness, and Luis Mata, whom they found unconscious, wedged between the toilet and rear wall of his cell. Padilla and Vancura retrieved the badly burned body of Buster Holsinger and evacuated 16 other inmates from that same wing. (Id. at 83-84, 122-26.)

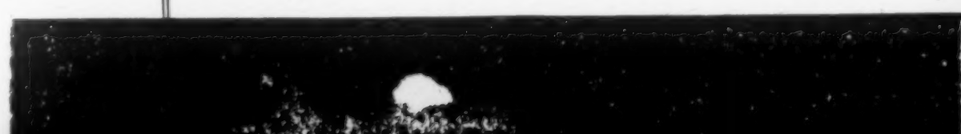
At least 1/2 hour later, in the squad room, Vancura saw petitioner again. Petitioner inquired whether anyone was dead. When Vancura answered that he did not know, petitioner said that he had "gotten the old man back." Petitioner had shown Holsinger a picture of his young niece and a crayon drawing from her. Upon looking at the picture -- according to petitioner -- Holsinger asked him if he "had ever ate his niece out." (R.T. of Oct. 17, 1985, at 126-28.) Later, when Detective Morgan arrived, Vancura heard petitioner repeat the same statements after Miranda warnings. (Id. at 130; R.T. of Oct. 22, 1985, at 80-84.) Petitioner told Morgan that he burned up Buster. He saved five bottles of Vitalis, poured it into a plastic ice cream container, put tissue paper in it, set it afire, and threw it through the bars at Holsinger. Petitioner said that Holsinger was standing near the door of his cell, ran around the cell after the flaming liquid hit him, then wrapped himself in a blanket. (Id. at 85-86.) He told Morgan that he had shown Holsinger a drawing from his niece and a picture of her. When Holsinger asked, "Did you ever eat her out?," petitioner decided to "burn Buster." (Id. at 86.) Petitioner also told Morgan that Holsinger, who was handicapped to a degree, had made a



"slave" of him and had him running errands. When petitioner learned that Holsinger was not quite so helpless as he thought, that angered him. (Id. at 101-02.) As petitioner was leaving the squad room, he asked Morgan whether he had done a good job (on Holsinger). Morgan asked what he thought. Petitioner said: "I think I did a damn good job." (Id. at 86.)

Michael Garten testified that he examined debris from Holsinger's cell, "ceiling slosh," and the ice cream container petitioner used to concoct his fire bomb. They contained ingredients indistinguishable from those used in Vitalis, or at a minimum, the same kind of alcohol residue found in Vitalis. (R.T. of Oct. 17, 1985, at 146-58.)

David Dale, Chief Fire Investigator, examined Holsinger's cell. He discovered a "V" slosh pattern on the ceiling of the cell; the walls displayed a clockwise sloshing pattern. The fire burned toward the front of the cell from the interior. Accelerant had been sloshed upon the locking mechanism of the pod door to render it inoperative. (R.T. of Oct. 22, 1985, at 11-24.) The "V" pattern on the ceiling indicated that the assailant reached through the food window -- about 20 inches wide and 3 feet from the floor -- and threw the flaming liquid upward in at least two separate motions. (Id. at 17.) Dale opined that the attacker made a minimum of three separate throws into the cell at different angles, but easily could have made six to nine throws. (Id. at 36.) Dale said that Holsinger was in the center of the fire, and was the target of the attack. (Id. at 33, 63.) Holsinger's burns, especially those of the face, were consistent with the kind made by liquid accelerant thrown directly upon a person. (Id. at 32-33, 58.) The severe burns beneath Holsinger's arms indicated that he raised his arms trying to smother the fire enveloping his face. (Id. at 33-35.)



By stipulation, the testimony of Dr. Thomas Jarvis from the 1982 trial was read into the record because he was out of the country. (Minute Entry of Oct. 17, 1985.) The autopsy revealed second and third-degree burns on Holsinger's face and arms, and on the side of his body. He died from aspirating hot gases and smoke. (R.T. of Sept. 28, 1982, at 135-39.) Jarvis received a letter from petitioner at his home September 6, 1982. He turned it over to the Pinal County Attorney. (Id. at 140-41.) William J. Flynn, questioned documents examiner, studied the letter and compared it to exemplars taken from petitioner. (Exhibits 26 and 31.) Noting the uniqueness of petitioner's ornate style, he concluded that petitioner wrote the letter to Jarvis. (R.T. of Oct. 22, 1985, at 70-74.) Flynn also testified that petitioner tried to disguise his writing style in the exemplars. (Id. at 75.) The letter to Jarvis said:

> Just answer one question doc. Did he look & smell like a burnt piece of toast? The way you did this medical report on buster -- looks like you had just as much fun as I did!
>
> Bonzai Bob
> [Petitioner's nickname]

(Exhibit 31.)

Dr. Paul Bindelglas, the defense expert, believed that there was a definite probability that petitioner had temporal lobe epilepsy, but that more testing was necessary. (R.T. of Oct. 22, 1985, at 120-29.) He could make only an educated guess about petitioner's state of mind when he murdered Holsinger, and, in fact, never gave an opinion about petitioners' sanity at the time of the murder. (R.T. of Oct. 23, 1985, at 8-10.) On cross-examination, Bindelglas admitted that petitioner displayed numerous traits characteristic of an antisocial personality. (Id. at 15-22.)

In rebuttal, the prosecutor called Drs. Masland, Tuchler, and LaWall. A neurologist with a subspecialization in epilepsy, Masland interviewed petitioner at prison June 24, 1985. He reviewed medical records at the prison and an EEG from 1978. He read the reports of Bindelglas and Tuchler, and a statement by a Dr. Bear from Boston. Masland examined petitioner looking specifically for indications of temporal lobe epilepsy -- and found none. He considered the 1978 EEG normal. (R.T. of Oct. 23, 1985, at 76-82.) Masland told the jurors that pattern-directed aggression or highly coordinated behavior during an epileptic seizure was extremely rare. (Id. at 84-85.) Masland concluded that, within all reasonable medical probability, petitioner's behavior when he ignited Holsinger did not result from temporal lobe epilepsy. Petitioner was competent and rational when Masland examined him and when he murdered Holsinger. (Id. at 102-06.)

Dr. Maier Tuchler, a neuropsychiatrist board certified in neurology, psychiatry, and forensic psychiatry, saw petitioner at least six times between 1978 and 1985. After the first examination in 1978, he diagnosed petitioner as antisocial personality. (R.T. of Oct. 24, 1985, at 3-9.) Tuchler saw petitioner two more times in 1978. On those occasions he was looking for signs of temporal lobe epilepsy, but found none. (Id. at 11.) Neither did Tuchler detect signs of mental illness or hallucinations. In 1979 Tuchler examined petitioner again. Again, he diagnosed him as antisocial personality; he saw no evidence of neurological defects and no need for more electrical studies. (Id. at 15.) Tuchler saw petitioner in July 1982, after he murdered Holsinger. Petitioner told him that he wished to be his own attorney, and his strategy

was to make the state spend a lot of money. (Id. at 16-17.) In January 1985, Tuchler examined petitioner, looking specifically for indications of temporal lobe epilepsy or a similar condition. (Id. at 18.) Conceding that additional tests could be performed to confirm or rule out temporal lobe epilepsy, Tuchler stated that, in his review of over a decade of petitioner's medical history, he had seen no indication of a temporal lobe disorder that could explain every act of violence. (Id. at 21-22.) Tuchler said one could not explain every act of violence, from the age of 10, as the product of an alleged temporal lobe seizure. (Id. at 24.) The decision that led to Holsinger's murder may have been impulsive, but the acts were planned; and even if petitioner had temporal lobe epilepsy, that could not have been responsible for the volitional and complex nature of the acts involved in the murder of Holsinger. It was Tuchler's opinion that petitioner was legally sane when he killed. (Id. at 26.)

Dr. John LaWall, board certified in psychiatry and forensic psychiatry, and board eligible in neurology, examined petitioner in 1982. Petitioner told him that in the past he claimed hallucinations to fake mental illness; his "suicide attempts" (only superficial wounds) were designed to get him to a hospital to increase his chances to escape. (R.T. of Oct. 24, 1985, at 64-70.) LaWall diagnosed petitioner as antisocial personality free of mental illness and legally sane at the time of the murder. (Id. at 70-72.)

REASONS FOR DENYING THE WRIT

I

PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL NOR OF THE BASIC TOOLS WITH WHICH TO BUILD HIS DEFENSE.

a.

Failure to make a threshold showing

Part of this Court's holding in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) was the following:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

470 U.S. at 74, 105 S. Ct. at 1091-92. Unfortunately, as Chief Justice Reinquist noted in his dissent, this Court did not at that time define what was necessary to make "a preliminary showing." 470 U.S. at 90, 105 S. Ct. at 1099. It should be apparent from the statement of facts in this case that there was absolutely nothing in any of petitioner's actions or statements that called into question his sanity at the time of the murder. Respondent does not believe that this Court's requirement of "a preliminary showing" meant that if a defendant simply had no other defense, and had to rely upon insanity, that he had made a preliminary showing. If that is the case, then every defendant who has no other defense, will always satisfy this threshold showing. Petitioner does not point to one action or statement surrounding the commission of the offense, or his statements made voluntarily after the offense, that would call into question his sanity at the time of the murder. Instead he relies upon past medical history and examinations, most of which diagnosed him as

antisocial personality, but a few of which concluded that he might have temporal lobe epilepsy, a physical condition, not a mental illness. Thus, petitioner has merely assumed that he satisfied the threshold showing required in Ake. When a petitioner can point to nothing in the facts, nothing in his actions or statements after the offense, that calls his sanity into question, respondent respectfully contends that reliance upon past medical history is insufficient to make a threshold showing that his sanity in this case can reasonably be called into question. In other words, if the mere assertion of insanity as a defense, with nothing in the actions or words of the defendant to suggest that, will satisfy the threshold showing spoken of in Ake, then in reality there is no threshold showing necessary. Both petitioner's words and his actions to police, and even to Dr. Jarvis some months later in the letter he sent Jarvis, indicate that he knew exactly what he was doing, intended to do it, concocted the firebomb with materials he had saved, and ignited Buster Holsinger in his cell. To say that any of those statements or actions suggests insanity is ludicrous. Therefore, respondent respectfully maintains that if this Court's requirement of a threshold showing in Ake is to have any substance, it must mean more than mere desperate reliance upon insanity when there is no other defense.

b.

Petitioner was not deprived of a fair trial nor of the basic tools with which to build an adequate defense.

Petitioner claims a denial of due process because the trial court did not allow him to arrange the tests he says would have provided a definitive answer about temporal lobe

epilepsy. No due process violation occurred because: (1) petitioner reads Ake far too broadly; (2) he has been examined by numerous doctors over a period of years; (3) defense counsel, through Dr. Bindelglas, presented everything pertinent to temporal lobe epilepsy; (4) the Constitution does not require that an extremely dangerous man be transported to another state for a 4 to 6-week stay to be observed by doctors of his choice; (5) even if a definitive diagnosis of temporal lobe epilepsy had been established, nobody could have determined whether petitioner was influenced by it when he killed Holsinger.

Ake v. Oklahoma can by no means be stretched to apply to petitioner. No psychiatrist examined Ake about his mental state at the time of the crimes -- only his competency to stand trial. Oklahoma refused to provide Ake any examination at state expense about his mental condition at the time of the offense. At trial there was no expert testimony for either side about Ake's mental state. Under those circumstances this Court described Oklahoma's obligation:

> This is especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today. . . .

470 U.S. at 78-79, 105 S. Ct. at 1094. (Emphasis added.) Ake did not give defense counsel carte blanche to name the doctors, tests, and location acceptable to counsel. In this case, Drs. Bindelglas, Bear, Bendheim, Tuchler, Masland, Baker, Gold, and LaWall examined petitioner before his first trial or the retrial. Drs. Bear, Tuchler, LaWall, and Masland are specialists in neurology. Through Dr. Bindelglas, petitioner was able to present a medical basis for the defense of temporal lobe epilepsy.

Bindelglas testified at length about the symptoms of that condition and how, in his opinion, it could render one legally insane. (R.T. of Oct. 22, 1985, at 119-67.) In addition, he referred to Drs. Enos, Bear, Schomer, Mark, Nelson, and Santiago, who had examined petitioner's medical records. (Id. at 153-56.)

This Court in Ake was concerned that the defendant have the basic tools to mount an adequate defense. Petitioner's argument, however, goes far beyond the scope of Ake: the state must arrange to have him transported to an out-of-state facility (either California or Massachusetts) for 4 to 6 weeks of observation and pay for tests to be performed by doctors of his choosing. Dr. Bindelglas admitted that, even if petitioner had temporal lobe epilepsy, that was not ipso facto grounds for concluding he was insane at the moment of the murder, and even after the tests, nobody could say if he was legally insane at the time he killed Holsinger. (Id. R.T. of Apr. 2, 1985, at 41, 64-65.)

The trial court denied the motion for out-of-state testing, but appointed Dr. William Masland, a neurologist, to examine petitioner to see if further tests were necessary. (Minute Entry of May 22 and June 13, 1985.) The trial court said that, if Masland believed further tests were necessary, additional arrangements would be made. (Minute Entry, June 18, 1985.) Masland concluded that further testing was not necessary because of the intensity of the observational data. (Instruments, at 355.)

Even if petitioner had satisfied the threshold test -- and respondent submits that he did not -- this Court utilized a tripartite test to see whether access to a competent psychiatrist was warranted: (1) the private

interests affected by the action of the state; (2) the governmental interests affected if the safeguard is provided; (3) the probable value of the additional procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interests if those safeguards are not provided. 470 U.S. at 77, 105 S. Ct. at 1093.

Respondent concedes that petitioner could satisfy the first part of the test, but he does not satisfy either of the two remaining parts. Petitioner could have been tested at the Arizona State Hospital, but Dr. Bindelglas did not want that. Instead, Bindelglas wanted to send petitioner out of state, to either Massachusetts or California, for 4-6 weeks of testing at the expense of Arizona. This was petitioner's second murder -- in 1978 he murdered his cellmate Frank Ponciano, but received a new trial from the Ninth Circuit. Vickers v. Ricketts, 798 F.2d 369 (9th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 928 (1987). Respondent respectfully maintains that, under these circumstances, the Constitution did not require that this dangerous double murderer be sent out of state for this prolonged testing. The Arizona Supreme Court recognized the expense and the burdensome security problem that would have entailed. State v. Vickers, 159 Ariz. 532, 537, 768 P.2d 1177, 1182 (1989).

Finally, and most important, is that any alleged psychiatric assistance derived from this out-of-state testing would have been of minimal assistance to the jurors in deciding the issue of sanity. Even if such testing had shown, at least in the opinion of those conducting the tests, that petitioner had temporal lobe epilepsy, none of them could have testified with a reasonable degree of

medical certainty: (1) that petitioner suffered a seizure at the time of the offense; or (2) if he suffered a seizure, that it in fact rendered him legally insane. The most any expert could have said would have been if petitioner suffered a seizure, it might have rendered him legally insane. When balanced against the three expert witnesses called by the state, who all testified that petitioner was not suffering a seizure at the time of the murder and was legally sane, such testimony would have been of minimal assistance to the jurors. The Arizona Supreme Court also recognized that. 159 Ariz. at 537, 768 P.2d at 1182.

Petitioner had the benefit of numerous examinations by many doctors over the years and immediately before trial in this matter. He had the tools for his defense and presented it through Dr. Bindelglas. Due process did not demand that the trial court permit this dangerous man to be taken out of state for 4-6 weeks of expensive testing that, even if favorable, would have been of minimal assistance in determining his sanity.

II, III, IV

Respondent heartily concurs that this Court ought to grant certiorari on these issues, as respondent has urged in the petition now pending before the Court in Ricketts v. Adamson, No. 88-1553 (filed Mar. 20, 1989). This Court should grant certiorari to affirm the Arizona Supreme Court and to reverse the gross distortion of law by the Ninth Circuit in its decision.

CONCLUSION

Respondent agrees that this Court should review questions II, III, and IV, but not the first issue presented by petitioner. Petitioner never made a threshold showing that any of his actions or statements at the time of the offense, or after it, indicated that his sanity was in question. Moreover, he is merely arguing that Arizona should have had to pay the expense of testing him for 4-6 weeks in another state so that he could try to obtain other opinions to bolster Dr. Bindelglas' opinion. In view of the burdensome security problem that petitioner would have presented, the expense of such prolonged testing, and the minimal value of such testing to the jurors, there was no deprivation of due process and this Court should deny certiorari on that issue.

DATED this 18th day of July, 1989.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

JACK ROBERTS
Counsel of Record
Assistant Attorney General

Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding three (3) copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

DENISE I. YOUNG
Arizona Capital Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-8185

this 18th day of July, 1988.

Jack Roberts
JACK ROBERTS

SUBSCRIBED AND SWORN to before me this 18th day of July, 1989.

Ethel M. Arment
NOTARY PUBLIC

My Commission Expires:

My Commission Expires Dec. 15, 1992

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